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In the

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-858

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONER

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In the

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THOMAS RICCI,

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CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH E. SIEGEL,

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the United States District Court for the Northern District of Illinois, Civil Action No. 69 C 1030 (1970, unpublished), the opinion of the Court of Appeals, 414 F.2d 713 (7th Cir., 1971) and the order of the Court of Appeals denying the Petition for Rehearing on the Issue of Primary Jurisdiction (unpublished), are reprinted in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 17, 1971. A timely Petition for Rehearing was denied on October 5, 1971. The Petition for for a Writ of Certiorari ("the Petition") was filed in this Court within 90 days from that latter date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This Court granted the Petition on February 28, 1972.

QUESTIONS PRESENTED

1. Whether, having found that the complaint properly alleges a boycott, a *per se* violation of Section 1 of the Sherman Act, by a commodities exchange, its officers and a member thereof, the Court of Appeals erred in invoking the doctrine of primary jurisdiction and ordering that the matter be submitted for decision to the Commodity Exchange Commission and/or the Secretary of Agriculture.

2. Whether the Commodity Exchange Act ("the Act") creates a regulatory scheme so pervasive as to exclude antitrust determinations by the statutory antitrust court where the regulatory agency by the Act:

   a. Is expressly given authority only to enforce the regulatory statute; and

   b. Is given no authority to grant antitrust exemption to commodities exchanges and their members or to determine antitrust issues; and

   c. Has by regulation excluded injured private parties from standing before such agency; and

   d. Is without authority to grant relief in the form of damages for injury resulting from antitrust violation or other tortious conduct.

3. Whether there exists a positive repugnancy between the antitrust laws and the Act and the respective objectives

thereof which requires the prior resolution of antitrust questions by an administrative agency.

4. Whether disposition of an antitrust case by the District Court wherein the injured party seeks only damages for past violations of the antitrust laws will disrupt the regulatory scheme created by the Act.

STATUTORY PROVISIONS INVOLVED

Section 4 of the Clayton Act (15 U.S.C. §15) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The pertinent provisions of the Commodity Exchange Act (7 U.S.C. §1 et seq.) are reprinted in the Addendum attached to this brief.

STATEMENT

This action was brought by plaintiff-appellant Thomas Ricci (hereinaafter "Ricci") for treble damages under Section 4 of the Clayton Act. (15 U.S.C. §15). Named as defendants were the Chicago Mercantile Exchange (hereinafter "the Exchange"), three of its officers and one of its members, Joseph Siegel and the Siegel Trading Company.* The complaint charges that the defendants violated Section 1 of the Sherman Act and otherwise tortiously interfered with commercial relationships in that they "willfully, knowingly and maliciously confederated, combined and conspired

* Hereinafter collectively referred to as "Siegel."

and agreed" to prevent Ricci from maintaining his membership on the Exchange and transacting business as a broker. (A. 11).

As this case arises on the pleadings, the facts are as alleged in the complaint.

Ricci had purchased a membership on the Exchange and was qualified to trade in commodities and commodities futures. (A. 10). Siegel claimed to be the owner of Ricci's membership, but Ricci informed the Exchange that his indebtedness to Siegel, upon which the latter's claim was based, was more than offset by certain fees owed by Siegel to Ricci. Siegel, however, thereafter induced the defendant officers of the Exchange to breach its rules and, by various means, (including the issuance of antedated release and the transfer of Ricci's membership to a third party), deprived Ricci of his membership and trading privileges. (A. 12-14). The effect of the conspiracy as alleged was completely to exclude Ricci from trading during the period from February 11, to March 4, 1969. By virtue of the alleged conspiracy, Ricci was seriously disadvantaged *vis a vis* other members of the Exchange who were his competitors and was injured in his business and property as a broker. (A. 13).

The District Court dismissed the complaint for failure to state a cause of action under Section 1 of the Sherman Act. (A. 22).

The Court of Appeals, with all three members in agreement, reversed the judgment of the District Court, holding that:

> "Transfer of his [Ricci's] membership in violation of the rules of the Exchange and pursuant to a conspiracy to intentionally injure his business would con-

stitute a group boycott, per se actionable under the Sherman Act. (A. 36).

• • •

"In view of the foregoing, we conclude that, absent any justification from the Exchange's status as a board of trade and a designated 'contract market', the complaint is sufficient to allege a group boycott, a per se violation of Section 1 of the Sherman Act." (A. 37).

However, the majority of the Court of Appeals (two judges) *sua sponte*, and with a strong dissent, ordered the cause remanded to the District Court with instructions to stay the proceedings pending action thereon "by the Commodities Exchange Commission and/or the Secretary of Agriculture." (A. 45).

This Court granted Ricci's Petition for Writ of Certiorari to the Court of Appeals on February 28, 1972.

SUMMARY OF ARGUMENT

The national economic policy embodied in the antitrust laws may not be frustrated because of the mere existence of a regulatory statute governing certain aspects of a particular industry. Absent a specific Congressional mandate to the contrary, antitrust questions are, under Section 4 of the Clayton Act, properly within the exclusive jurisdiction of the district courts. There is no such mandate in the Commodity Exchange Act. Nothing in the said Act confers upon the administrative agency any responsibility for antitrust determinations. The agency is expressly limited to the enforcement of the Act's provisions. The regulatory scheme is not so pervasive that the agency can fulfill its statutory functions only by excluding the District Court from the disposition of antitrust issues.

The conduct alleged in the complaint is a *per se* violation of the antitrust laws. It is not arguably lawful under the Commodity Exchange Act. Hence, a determination by the statutory antitrust court will not disrupt the administrative scheme. Moreover, the complaint seeks damages for past conduct, not prospective injunctive relief. Hence, there is no danger that the District Court's determination of an antitrust issue will conflict with agency administration of the regulatory statute.

Finally, the regulatory agency is without power to afford an injured private party monetary relief. The regulations promulgated by the administrator expressly exclude injured private parties from all but minimal and indirect access to the agency's enforcement processes.

In these circumstances, it was improper for Court of Appeals to invoke the doctrine of primary jurisdiction. Invocation here extends the said doctrine's use far beyond that heretofore authorized and is an unneeded and unwarranted exercise in judicial self restraint.

ARGUMENT

I. THE COMMODITY EXCHANGE ACT DOES NOT CREATE AN EXEMPTION FROM THE ANTITRUST LAWS.

The judgment of the court below is premised upon the assumption that defendants' wrongful conduct, although a *per se* violation of the Sherman Act, may, in some manner, be excused by the Secretary of Agriculture (hereinafter "the Secretary") or the Commodity Exchange Commission (hereinafter "the CEC"). The Court of Appeals has thus sought to immunize conduct violative of the antitrust laws. This is contrary to basic principles to be applied to the relationship between the regulatory and antitrust statutes.

A. The Court Below Ignored Fundamental Antitrust Policy.

This Court has consistently held that, since the antitrust laws represent basic economic policy, repeal of such laws by implication from a regulatory statute will be strongly disfavored. *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939); *United States* v. *Southern Pacific Co.*, 259 U.S. 214, 239 (1921); *California* v. *Federal Power Commission*, 369 U.S. 482, 485 (1962); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963); *Carnation Co.* v. *The Pacific Westbound Conference*, 383 U.S. 213, 217 (1966). In *Carnation*, this Court stated:

> "We recently said: 'Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.' *United States* v. *Philadelphia National Bank*,

> *supra. We have long recognized that the antitrust laws represent a fundamental national economic policy and have therefore concluded that we cannot lightly assume that the enactment of a special regulatory scheme for particular aspects of an industry was intended to render the more general provisions of the antitrust laws wholly inapplicable to that industry.* We have, therefore, declined to construe special industry regulations as an implied repeal of the antitrust laws even when the regulatory statute did not contain an accommodation provision. . . ." (383 U.S. at 217-218, emphasis supplied)

This above stated doctrine, ". . . which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy . . ." (*United States* v. *Philadelphia National Bank,* 374 U.S. at 348), is controlling in this case. The decision of the court below can be sustained only if there exists a "plain" or "positive repugnancy" between the antitrust laws and the Commodity Exchange Act. *U. S.* v. *Borden Co.,* 308 U.S. 188, 199 (1939). To find such a repugnancy, it must be shown that Congress in enacting in the regulatory statute intended to restrict or eliminate antitrust considerations in the regulated industry. As stated recently by the Court of Appeals for the District of Columbia in *Seatrain Lines, Inc.* v. *Federal Maritime Commission,* 1972 CCH Trade Cas. ¶73,898 (D.C. Cir., 1972):

> ". . . [T]he proper inquiry [in cases such as this one] would seem to be to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws. . . ." (1972 CCH Trade Cas. at p. 91,730, brackets by the court).

The specific language of the Commodity Exchange Act, its legislative history and the regulatory structure which it

created demonstrate with unusual clarity that Congress at no time intended to circumvent the authority of the district court to hear and determine antitrust cases involving commodity exchanges.

B. The Words of the Statute Do Not Authorize the Secretary or the CEC to Mitigate or Immunize Antitrust Violations.

The court below ignored the primacy of the antitrust laws by imputing to the Secretary authority which the plain language of the regulating statute does not give. Words of statutes are to be taken in their "normal and customary meaning." The judiciary cannot engraft thereon additions or restrictions which Congress did not see fit to enact. *Federal Trade Commission* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968); *Sun Oil Co.* v. *Federal Trade Commission*, 371 U.S. 505, 514 (1963); *Schweggmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. at 384, 388 (1951); *Georgia* v. *Evans*, 316 U.S. 159, 162-163 (1942); *United States* v. *Cooper Corp.*, 341 U.S. 600, 605 (1941). This canon of construction was ignored by the court below. Section 4 of the Clayton Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws *may sue therefor in any district court of the United States* . . . and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee." (emphasis supplied)

In contrast, the Commodity Exchange Act expressly limits the enforcement power of the Secretary and the CEC to violation of ". . . any of the provisions of this chapter or any of the rules, regulations, or orders . . ." of the Secretary or the CEC. (7 U.S.C. §13a and b). The term "this

chapter" is specifically defined as "the Commodity Exchange Act." (7 U.S.C. §1). The agency's statutory limitations are reinforced by the regulations promulgated by the Secretary. The term "Act" is expressly defined in the regulations as the Commodity Exchange Act. Title 17, C.F.R. §§0.2(a) and 0.52(a). The authority of the Secretary and the Commission to institute proceedings must be based upon their having reason to believe that a violation of "the Act" has or is taking place. Title 17, C.F.R. §§0.3(c), 0.53(c). The plain language of the Act and the complete absence of any provision therein for antitrust immunity or authority in the administrator to make antitrust determinations caused the dissenting judge in the court below, to state:

> "Congress has strictly limited the jurisdiction of the Secretary of Agriculture and the Commission to violations of 'the provisions of this chapter' (See, e.g., Title 7 U.S.C. §13(a)). This chapter means the 'Commodity Exchange Act' (Title 7, U.S.C. §1) and not the 'Sherman Act', which is found at 15 U.S.C. §1."

Thus, the express provisions of the statute creating the agency and the regulations under which it operates demonstrate a complete absence of antitrust enforcement powers. If Congress had desired to provide the agency with the authority to make antitrust determinations, it could easily have done so. *U.S.* v. *Borden Co.*, 308 U.S. 188, 201 (1939). Clearly, Congress chose otherwise. Nonetheless, contrary to the plain language of both the Clayton and Commodity Exchange Acts, the Court of Appeals stripped the district court of the power to determine antitrust issues in private actions, a function which Congress specifically assigned to it.

The legislative history of the Commodity Exchange Act and of its predecessors, the Grain Futures Act of 1922 and the Futures Trading Act of 1921 clearly demonstrate that Congress saw no repugnancy between the antitrust and the commodities laws. The legislative history reflects neither debate nor discussion of the antitrust laws, let alone the notion of a repugnancy between antitrust and commodities legislation. 61 Cong. Rec. 1312-1341; 1366-1399; 1428-1430; 4646-4656; 4760-4771; 5027-5031; 5376; 5518-5520; 5555-5562 (1921); 62 Cong. Rec. 9175-9178; 9403-9450; 12564; 12567-12568; 12720-12725 (1922); 79 Cong. Rec. 8585-8595; 14246 (1935); 80 Cong. Rec. 491-492; 1451; 4391; 6159-6164; 6612-6613; 7051; 7710; 7845-7873; 7905-7912; 7916-7918; 8010-8090; 8288-8293 (1936); 113 Cong. Rec. 10838-10849; 28202, no debate (1967); 114 Cong. Rec. 13668; 19767, no debate (1968).

The lack of discussion of the antitrust laws is especially noteworthy since the 67th Congress which enacted the Futures Trading Act and the Grain Futures Act also enacted the Capper-Volstead Agricultural Producers' Act (7 U.S.C.A. §§291, 292), which (1) specifically confers exemptions from the antitrust laws and (2) vests in the Secretary of Agriculture enforcement powers against any such association where he believes it monopolizes or restrains trade to such an extent that price is unduly enhanced.

The history and language of the Capper-Volstead Act demonstrate that Congress confers antitrust powers or antitrust exemptions when that is its purpose. It is likewise clear that in the legislation dealing with commodities, the same Congress conferred neither antitrust powers nor

antitrust exemptions.[1] It is also noteworthy that the 74th Congress which passed the Commodity Exchange Act without any discussion of antitrust laws was a Congress keenly aware of antitrust considerations—it enacted the Robinson-Patman Price Discrimination Act (15 U.S.C.A. §§13-13b, 21a).[2]

II. THE REGULATORY SCHEME IS NOT SO PERVASIVE AS TO EXCLUDE OR SUPERSEDE THE ANTITRUST POWERS OF THE DISTRICT COURT.

A District Court's jurisdiction in antitrust matters may be restricted only where Congress has substituted for competition a comprehensive regulatory scheme which requires

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[1] Congressional debate on the Capper-Volstead Agricultural Producers' Association Act (7 U.S.C.A. §§291, 292) took place in February 1922 (62 Cong. Rec. 2048-2054; 2057-2061; 2107-2123; 2156-2174; 2216-2230; 2256-2282 (1922)), after passage of the Futures Trading Act of 1921 but before debate on the Grain Futures Act of 1922, the latter debates having taken place in June 1922 (62 Cong. Rec. 9175-9178; 9403-9450; 12564; 12567-12568; 12720-12725 (1922)). It is clear that although the issue of antitrust exemptions was before the 67th Congress, it was an issue which did not arise during consideration of the Grain Futures Act.

[2] Much of the debate on the Commodity Exchange Act and on the Robinson-Patman Act took place during the same period of time, i.e., April and May of 1936. Thus, while the House was engaged in debate on the antitrust ramifications of the Robinson-Patman Act on May 27th and 28th (80 Cong. Rec. 8111-8140; 8223-8242 (1936)) the Senate was debating the Commodity Exchange Act on May 25th and May 27th (80 Cong. Rec. 7845-7873; 8010-8090 (1936)). Senate consideration of the Commodity Exchange Act had also taken place on April 27 (80 Cong. Rec. 6159-6164 (1936)) just before the Senate discussed the Robinson-Patman Act on April 28 and April 30 (80 Cong. Rec. 6279-6288; 6425-6436 (1936)).

an initial agency determination of antitrust questions. The doctrine of primary jurisdiction is applicable only "where protection of the integrity of the regulatory scheme dictates preliminary resort to the agency which administers the scheme." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963). In other words, the regulatory scheme must be "pervasive" in that its operation substitutes agency action for competition as safeguarded by the antitrust laws. *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959); *California* v. *Federal Power Commission*, 369 U.S. 483, 485 (1962). Thus the core issue in this case is whether Congress intended to substitute regulation for free competition.

"Pervasiveness" in primary jurisdiction cases is perhaps best exemplified by the rate making and route assignment powers of regulatory agencies in the transportation industry. There, Congress, in addition to providing the specific antitrust immunity lacking here, also created a comprehensive system governed at every turn by the agency rather than competitive forces. See *United States* v. *Radio Corporation of America*, 358 U.S. 334, 346 (1959).

In contrast, the regulation of commodities markets is not so pervasive as to exclude antitrust considerations or require their preliminary determination by the agency. The Act empowers the agency to act in certain specified areas. The Secretary is authorized to license and regulate commodity exchanges and trading thereon and to investigate, punish and prevent violations of the Act. The Act provides that commodity exchanges must register with the Secretary and qualify as "contract markets" by complying with carefully defined statutory requirements. 7 U.S.C. §7. These include location at a terminal market, the filing of periodic reports, prevention of dissemination of false market information and of manipulation. 7 U.S.C.

§7(a)-(d). Contract markets are also required (7 U.S.C. §7a) to furnish the Secretary with copies of their by-laws, rules and regulations and to allow inspection of their books and records by the United States Department of Agriculture. The Act similarly establishes certain duties with respect to warehouse records and the delivery of actual cash commodities. The 1968 amendments to the Commodity Exchange Act (7 U.S.C. §§7a(8) and (9)) require contract markets to enforce rules and regulations relating to the terms and conditions of transactions in the market and the maintenance of minimum financial standards for the members thereof.

However, nowhere in the scheme of contract market regulation is there any provision which gives the Secretary or the CEC the authority to even consider, let alone immunize, punish, prevent or award damages for, violations of the antitrust laws. The lack of a comprehensive or pervasive regulatory scheme renders this doctrine of primary jurisdiction inapplicable to the case. *California* v. *Federal Power Commission*, 369 U.S. 482 (1962); *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U.S. 458 (1960); *United States* v. *Radio Corp. of America*, 358 U.S. 334, 350 (1959); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963). The regulatory scheme relied upon by the court below is admittedly far less pervasive than those considered in the foregoing cases where this Court refused to defer to regulatory agencies because the regulatory scheme in question provided no substitute for competition protected by the antitrust laws.

In *United States* v. *Radio Corporation of America*, 358 U.S. 334 (1959) the government charged that RCA and its wholly owned subsidiary, NBC, were engaged in a continuing conspiracy violative of Section 1 of the

Sherman Act. NBC's objective was the acquisition of stations in five of the eight largest market areas in the country. The complaint charged that, in furtherance of the conspiracy, NBC had utilized its leverage of network affiliation to force Westinghouse Broadcasting Co. to exchange its Philadelphia station for NBC's station in Cleveland. The Federal Communications Commission approved the exchange. However, this Court held that Congress had not empowered the FCC to decide antitrust questions, nor was the agency's action intended by Congress to bar federal courts from antitrust enforcement in the industry. This Court compared the FCC's authority with that of the Interstate Commerce Commission in regulating common carriers. The comparison provides a useful analogy to the regulatory scheme in the instant case. As stated by this Court:

> "There carriers could charge only the published tariff, and that tariff must have been found by the appropriate agency to be reasonable. *Free rate competition was modified by federal controls.* The Court's concern was that the agency which was expert in, and responsible for, administering those controls, should be given the opportunity to determine questions within its special competence as an aid to the courts in resolving federal antitrust policy and federal regulatory patterns into a cohesive mold. *That some resolution is necessary where the antitrust policy of free competition is placed beside a regulatory scheme involving fixed rates is obvious.* (358 U.S. at 348, emphasis supplied.)

While regulation replaced free competition in the transportation industry, this Court stated: ". . . The field of broadcasting is one of free competition." This Court concluded:

> " 'The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme,

> *abandoned the principle of free competition as it has done in the case of railroads . . .'* Thus, there being no pervasive regulatory scheme, and no rate structures to throw out of balance, the sporadic action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (358 U.S. at 349 emphasis supplied)

A similar result was reached by this Court in *California* v. *Federal Power Commission*, 369 U.S. 482 (1962). There, a natural gas company acquired the stock of a pipeline corporation. When the government brought an action in district court charging that the acquisition violated Section 7 of the Clayton Act, the natural gas company made application to the FPC for a certificate of "convenience and necessity" to enable it to acquire the pipeline company's assets. The district court then stayed its proceedings pending final decision by the administrative agency. The FPC thereafter approved the merger. On certiorari, this Court vacated the FPC's order approving the merger and remanded the cause, holding that the FPC should not have proceeded to decide the merits of the application while the antitrust suit was pending in the courts. This Court found that Section 7 of the Clayton Act reserved to the district courts rather than the FPC, the power to make findings as to the competitive impact of the merger. Thus, while the agency was given *limited* authority with respect to natural gas mergers, the agency's responsibility was not so comprehensive as to deprive the courts of antitrust jurisdiction.

Similarly, nothing in the Act indicates that Congress intended either "to abandon the principle of free competition" or insulate group boycotts from the antitrust laws. The defendants' private agreements which excluded Ricci from trading were not approved by the agency. Ricci's exclusion from the field was accomplished by a conventional

business conspiracy, which, among other things, might also have violated the rules of the Exchange. Whether this incidental violation of the Exchange's rules might justify the Secretary in punishing the perpetrators, as by excluding them from trading, has no bearing on antitrust considerations.

The Secretary has the power to determine that the conduct in question is a "minor violation" of the Act and therefore do nothing about it. However, the discretionary action of an administrative officer in choosing not to proceed against a "minor violation" is not a vital component in a pervasive regulatory system. Enforcement of the antitrust laws is entrusted neither to the Secretary nor the CEC, but to the courts. Hence, the Secretary's discretion to punish or excuse a group boycott is not the equivalent of authorization to immunize the participants therein from antitrust liability. By the same token, the district court's consideration of antitrust issues will have no effect on the Secretary's administration of the Act. It will not unbalance administratively established rate structures or disrupt a continuing detailed program which has replaced competition. Simply stated, this case concerns a statutory tort which is neither justified, immunized, mitigated or excused by any pervasive regulatory scheme. Only an *ad hoc* determination need be made concerning the alleged wrong to an individual neither justified by any pervasive regulatory scheme nor required by an authorized program designed to limit competition in the public interest. Hence, as this Court stated in *RCA*, "Action by federal courts can work no mischief. The justification for primary jurisdiction accordingly disappears." (358 U.S. at 350)

The lower federal courts have similarly refused to defer to administrative agencies for antitrust determinations in

absence of specific congressional authority. *Seatrain Lines, Inc.* v. *Federal Maritime Commission,* 1972 C.C.H. Tr. Cases, ¶73,898 (D.C. Cir., 1972); *Denver Union Stockyards Co.* v. *Denver Livestock Commission Co.,* 404 F.2d 1055, 1059 (10th Cir., 1968); *Crane* v. *Bluegrass Stockyards Co.,* 399 F.2d 868 (6th Cir., 1968); *Keon Construction Co.* v. *McClatchy Newspapers,* 1970 C.C.H. Tr. Cases, ¶73,212, (N.D. Cal., 1969).

In *Seatrain,* the Court of Appeals for the D.C. Circuit found that, although Congress had given the FMC broad regulatory powers over "agreements" among water carriers, that power did not extend to mergers and acquisitions. Similarly, in *Denver Union* and *Bluegrass Stockyards,* the Courts of Appeals for the 10th and 6th Circuits, respectively, refused to defer to the Secretary of Agriculture because the regulatory statute* did not provide for antitrust determinations of the matters in question. In *Denver Union,* the court declined to stay an antitrust merger suit pending determination by the Secretary under the doctrine of primary jurisdiction. In *Bluegrass Stockyards,* as here, an appropriately licensed dealer claimed that he had been unjustly refused the use of the facilities and services of a regulated marketplace, in violation of the Sherman Act. There, as here, the defendant had adopted rules and regulations which allegedly related to antitrust questions. The Court of Appeals refused to refer the matter to the Secretary of Agriculture under the doctrine of primary jurisdiction. The court stated that the only matters which need be considered by the Secretary, if they became relevant, were those dealing with the reasonableness of the

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* Packers and Stockyards Act of 1921; 7 U.S.C. §181, et seq.

rules, not whether plaintiff had violated them. See also, *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.*, 1971 C.C.H. Trade Cas. ¶73,775 (S.D.N.Y., 1971).

In this case, the complaint alleges only that the Exchange violated its own rules; the reasonableness of such rules is not attacked. The court below found that the complaint stated a *per se* violation of the Sherman Act. Thus, as in the Stockyards cases, although the facility is regulated by the Secretary, such regulation is not pervasive and provides no grounds for the invocation of primary jurisdiction. There, as here, the regulatory scheme simply did not comprehend the antitrust conduct before the Court.

III. THE DISTRICT COURT'S DISPOSITION OF AN ANTITRUST TREBLE DAMAGE CASE WILL NOT DISRUPT THE AGENCY'S ADMINISTRATION OF CONTRACT MARKETS SINCE GROUP BOYCOTTS ARE NOT ARGUABLY LAWFUL UNDER THE COMMODITY EXCHANGE ACT.

The court below found that ". . . the complaint is sufficient to allege a group boycott a per se violation of Section 1 of the Sherman Act." The issue of antitrust liability is not even disputed before this Court since the defendants herein did not file cross-petitions for certiorari.* Moreover, while the Court of Appeals found that the conduct alleged violated the Sherman Act, it did not find that such conduct was arguably lawful under the regulatory

* The Court will note that, at the request of defendant Chicago Mercantile Exchange, certain portions of plaintiff's deposition and exhibits thereto are included in the Appendix. This case, however, was appealed from a judgment of the district court *on the pleadings*. The Court of Appeals held that the district court did not have before it a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

scheme. The court below merely observed that the Secretary could decline to report the matter for prosecution as a "minor violation" of the Commodity Exchange Act. Such an expression of disinterest by the Secretary neither determines antitrust liability nor legalizes the boycott under the Act. Thus, the lack of any regulatory justification for a boycott precludes application of primary jurisdiction. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 221-222 (1966); *Allied Air Freight, Inc.* v. *Pan American World Airways,* 393 F.2d 441 (2d Cir., 1968), *cert. denied,* 393 U.S. 846 (1968); *Marnell* v. *United Parcel Service of America, Inc.,* 260 F. Supp. 391 (N.D. Cal., 1966); *Breen Air Freight, Ltd.* v. *Air Cargo, Inc.,* 1971 C.C.H. Tr. Cases, ¶73,775, (S.D.N.Y., 1971).

Moreover, plaintiff brought suit not to enjoin future conduct, but for damages for a past antitrust violation not excused by any other statute. This Court has recognized that such cases are within the province of the district courts. In *Carnation,* the shipper-plaintiff sought treble damages from shipping conferences which allegedly violated antitrust laws by maintaining shipping rate increases for evaporated milk pursuant to ratemaking agreements which had not been approved by the Federal Maritime Commission. The Court distinguished its earlier decisions in *Far East Conference* v. *United States,* 342 U.S. 570 (1952) and *United States Navigation Co.* v. *Cunard S.S. Co.,* 284 U.S. 474 (1932), where plaintiffs had sought to *enjoin* implementation of unapproved agreements, thereby creating the possibility of conflict between the courts and the FMC. As stated by this Court:

> *"The award of treble damages for past and completed conduct which clearly violated the shipping act would certainly not interfere with any future action of the Commission.* Although the Commission can ap-

prove prospective operations under agreements which have been implemented without approval, respondents concede that the Commission has no power to validate pre-approval implementation of such agreements. Therefore the *Far East* and *Cunard* principles only preclude courts from awarding treble damages when the defendants' conduct is arguably lawful under the Shipping Act." 383 U.S. at 222, emphasis supplied)

The impropriety of primary reference to an administrative agency is demonstrated by the decision of the Court of Appeals for the Second Circuit in *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir., 1968), *cert. denied*, 393 U.S. 846 (1968). There, the complaint alleged that Pan American had entered into a conspiracy in restraint of trade with Add Air Freight Corp. for the purpose of securing for Add a monopoly on air freight forwarding business between New York and Puerto Rico. In furtherance of the conspiracy, Pan American allegedly denied airplane space to shipments consolidated by plaintiffs and gave undue preference to shipments consolidated by Add. The Court of Appeals vacated a stay order which would have referred the matter to the Civil Aeronautics Board, stating that:

"Since defendants conduct is not arguably lawful under the Federal Aviation Act and plaintiff does not seek injunctive relief, we see no reason why the antitrust action should not proceed." (393 F.2d at 448)

Similarly, in *Marnell* v. *United Parcel Service of America, Inc.*, 260 F.Supp. 391 (N.D. Cal., 1966), the district court in refusing a stay of private treble damage proceedings pending reference to the Interstate Commerce Commission, stated:

> "There is not present in this case a question of 'debatable legality' in the sense in which that term was used in *Carnation*, i.e., a legality in the sense that the conduct in question might be exempt from the antitrust laws by the regulatory agency under some express or plainly implied provision of the regulatory act." (260 F.Supp. at 412)

In the instant case, the Court of Appeals recognized that defendants' conduct was without "debatable legality" under the Commodity Exchange Act. However, the majority was concerned that since the CEC or the Secretary might consider defendants' actions to be "minor violations", a treble damage award would conflict with an agency decision "in the public interest" not to take the punitive action permissible under the regulatory statute. The Court of Appeals' narrow view disregards this Court's repeated recognition of the role of private treble damage actions in antitrust enforcement. Congress enacted the treble damage provisions in the Clayton Act "not merely to compensate those who have been directly injured, but also to vindicate the important public interest in free competition" *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 502 (1969). The Court of Appeals ignored congressional objectives in substituting a nonexistent regulatory objective for a specific statutory right to redress.

Moreover, the Court of Appeals' concept of the relationship between "public interest" and the antitrust laws in primary jurisdiction cases does not square with this Court's decisions. For nearly thirty years, this Court has held that, in absence of a specific exemption, the concept of "public interest" in regulatory statutes is not so comprehensive as to exclude judicial determination of antitrust issues by federal courts. *California* v. *Federal Power*

Commission, 369 U.S. 483, 485 (1962); *United States* v. *Radio Corporation of America*, 358 U.S. at 334, 351 (1959); *National Broadcasting Company* v. *United States*, 319 U.S. 190, 222-225 (1943). As stated by this Court in *California* v. *Federal Power Commission*:

> "Here, as in *United States* v. *Radio Corporation of America*, 358 U.S. 334 . . . while 'antitrust considerations' are relevant to the issue of 'public interest, convenience, and necessity' (id. 358 U.S. at 351), there is no 'pervasive regulatory scheme' (ibid.) including the antitrust laws that has been entrusted to the Commission." (369 U.S. at 485)

In this case, regardless of whether the Secretary chooses "in the public interest" to classify group boycotts as a minor violation, the antitrust liability remains unaltered. Since the Secretary does not have the power to immunize or even determine antitrust issues, it must be decided by the tribunal authorized by Congress to do so. The conduct in question injured the business of plaintiff and, regardless of the Secretary's feeling in the matter, Congress has given Ricci a statutory action by which he may vindicate his rights.

IV. THE ADMINISTRATIVE AGENCY CANNOT GRANT RICCI THE RELIEF WHICH HE SOUGHT.

The agency's limitations in the field of antitrust enforcement are matched by its statutory incompetence to grant treble damage relief and its exclusion of private parties from the administrative process. Only the Secretary may institute proceedings by the issuance of a complaint; such proceedings "will not be instituted upon pleadings filed by private persons." Title 17, C.F.R. §§0.3(c), 0.53(c). Ricci may apply for the institution of administrative proceedings before the Secretary and/or the CEC, Title 17, C.F.R.

§§0.3(a), 0.53(a), but would "have no legal status in the proceeding which may be instituted", unless permitted by the Secretary to intervene. Title 17, C.F.R. §§0.3(b), 0.53(b). Intervention by private persons is limited to presenting arguments and evidence. The injured party has no right to seek damages before the agency. Thus, reference to an impotent agency only frustrates and delays Ricci's right to his day in court. Clearly, such a result was never intended by Congress. *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir., 1928), *cert. denied*, 393 U.S. 846 (1968); *Trans World Airlines* v. *Hughes*, 214 F. Supp. 106 (S.D.N.Y., 1963), *aff'd*, 332 F.2d 602 (2d Cir., 1964); *Breen Air Freight Ltd.* v. *Air Cargo, Inc., et al.*, 1971 CCH Trade Cas. ¶73,775 (S.D.N.Y., 1971).

In *Trans World Airlines* v. *Hughes*, the district court held that although the acquisition of an airline by an aircraft supplier had been approved by the Civil Aeronautics Board, the supplier was not thereby immunized from a treble damage action charging the supplier with monopolizing the sale and lease of aircraft and conspiring to finance only purchases of its aircraft by the acquired airline. The court stated:

> "Furthermore, the Board has no power to award damages, and we do not reach the statement of accord in Panagra [Pan American World Airways, Inc. v. United States, 371 U.S. 296 (1963)] to the effect that since the Board's essential regulatory powers deal with division of territories, etc., then Congress must have intended to give it authority that was ample to deal with the evil at hand. *Rather, the statement by the court that a court has jurisdiction under the anti-trust laws if the agency has no power to grant relief is controlling here.*" (214 F.Supp. at 111-112, emphasis supplied).

On appeal, the Court of Appeals for the Second Circuit (332 F.2d 602) stated in affirming that Congress has not relegated the alleged unlawful transactions to CAB determination hence there was no basis for depriving federal courts of jurisdiction. Moreover, the court found no necessity for a uniformity of policy with respect to the transactions in question nor was the board more qualified to consider such charges than were the federal courts ". . . which daily encounter and resolve antitrust problems."

In *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir., 1968), the Court of Appeals in refusing primary reference to the Civil Aeronautics Board found that the Board had no power to award damages for unfair competitive practices. In *Denver Petroleum* v. *Shell Oil Co.*, 306 F.Supp. 289 (D.Colo., 1969), the court held that the failure of a crude oil dealer to seek administrative relief following the refusal of an integrated oil company to transport oil through its pipeline system did not bar an antitrust action. Defendant's refusal to transport crude oil in a pipeline subject to the common carrier obligations of Section 28 of the Mineral Leasing Act constituted part of the charge of monopolization. There was, however, no administrative power to enforce compliance with the act or exempt pipelines from its provisions. The court held that defendant's invocation of the doctrine of primary jurisdiction was inappropriate, stating:

> "That the section leaves only the express remedy for violation in the hands of the courts makes it clear that the determination of a violation is regarded as being within the judicial competence." (306 F.Supp. at 304).

In the instant case, the administrative agency is without power, either express or implied, to afford plaintiff any

remedy. Only the courts are available to him as a forum. In these circumstances, abdication of judicial responsibility will merely hinder, delay and restrict plaintiff's statutory remedy. The late Mr. Justice Frankfurter, dissenting in *Meat Cutters Union* v. *Jewel Tea Co.*, 381 U.S. 676, 686 (1965), stated:

> ". . . the doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to 'an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency.'" (381 U.S. at 686)

In the instant case, the administrative agency has neither the authority, competence nor power to determine antitrust questions or provide relief to injured private parties. Hence, deference to the administrator is beyond the requirements of the statute which created the agency and can serve only to delay Ricci's right to redress.

CONCLUSION

By virtue of the foregoing, petitioner respectfully prays that the judgment of the court below be reversed and the cause remanded for further proceedings.

Respectfully submitted,

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ADDENDUM

The Commodity Exchange Act (7 U.S.C. § 1, et seq.) provides in pertinent part:

1. Short title

This chapter may be cited as the "Commodity Exchange Act." Sept. 21, 1922, c. 369, § 1, 42 Stat. 998; June 15, 1936, c. 545, § 1, 49 Stat. 1491.

§ 7. Designation of board of trade as "contract market"; conditions and requirements

The Secretary of Agriculture is hereby authorized and directed to designate any board of trade as a "contract market" when, and only when, such board of trade complies with and carries out the following conditions and requirements:

(a) When located at a terminal market where any cash commodity of the kind specified in the contracts of sale of commodity for future delivery to be executed on such board is sold in sufficient volumes and under such conditions as fairly to reflect the general value of the commodity and the differences in value between the various grades of such commodity, and where there is available to such board of trade, official inspection service approved by the Secretary of Agriculture for the purpose: *Provided,* That any board of trade not so located shall be designated as a "contract market" if such board of trade provides for the delivery of commodities on such contracts at a delivery point or points and upon terms and conditions approved by the Secretary of Agriculture.

(b) When the governing board thereof provides for the making and filing by the board or any member thereof, as the Secretary of Agriculture may direct, or reports in accordance with the rules and regulations, and in such manner and form and at such times as may be prescribed

by the Secretary of Agriculture, showing the details and terms of all transactions entered into by the board, or the members thereof, either in cash transactions or transactions for future delivery consummated on or subject to the rules of a board of trade, or transactions for future delivery, and when such governing board provides, in accordance with such rules and regulations, for the keeping of a record by the board or the members of the board of trade, as the Secretary of Agriculture may direct, showing the details and terms of all cash and future transactions entered into by them, consummated on or subject to the rules of a board of trade, such record to be in permanent form, showing the parties to all such transactions, including the persons for whom made, any assignments or transfers thereof, with the parties thereto, and the manner in which said transactions are fulfilled, discharged or terminated. Such record shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and shall at all times be open to inspection of any representative of the United States Department of Agriculture or United States Department of Justice.

(c) When the governing board thereof provides for the prevention of dissemination by the board or any member thereof of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of commodity in interstate commerce.

(d) When the governing board thereof provided for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board.

(e) When the governing board thereof does not exclude from membership in and all privileges on such board of trade any duly authorized representative of any lawfully formed and conducted cooperative association of producers having adequate financial responsibility which is engaged in any cash commodity business, if such association

has complied, and agrees to comply, with such terms and conditions as are or may be imposed lawfully on other members of such board: *Provided,* That no rule of a contract market shall forbid or be construed to forbid the return on a patronage basis by such cooperative association to its bona fide members of moneys collected in excess of the expense of conducting the business of such association.

(f) When the governing board provides for making effective the final orders or decisions entered pursuant to the provisions of section 9 of this title, and the orders issued pursuant to the provisions of section 7a of this title, and for compliance in all other respects with the requirements applicable to such board of trade under this chapter.

As amended Feb. 19, 1968, Pub.L. 90-258, §§ 10, 11, 82 Stat. 29.

§ 7a. Duties of contract markets

Each contract market shall—

By-laws, rules, etc.; furnishing copies to Secretary

(1) Promptly furnish the Secretary of Agriculture copies of all by-laws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or any committee, and of all changes and proposed changes therein;

Access for inspection of books and records

(2) keep all books, records, minutes, and journals of proceedings of such contract market, and its governing board, committees, subsidiaries, and affiliates in a manner that will clearly describe all matters discussed by such contract market, governing board, committees, subsidiaries and affiliates and reveal any action taken in such matters, and allow inspection at all times by any authorized representative of the United States Department of Agriculture or United States Department of Justice of all such books,

records, minutes, and journals of proceedings. Such books, records, minutes, and journals of proceedings shall be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct;

Books and records of warehouses; keeping and inspection

(3) Require the operators of warehouses in which or out of which any commodity is deliverable on any contract for future delivery made on or subject to the rules of such contract market, to make such reports, keep such records, and permit such warehouse visitation as the Secretary of Agriculture may prescribe. Such books and records shall be required to be kept for a period of three years from the date thereof, or for a longer period if the Secretary of Agriculture shall so direct, and such books, records, and warehouses shall be open at all times to inspection by any representative of the United States Department of Agriculture or United States Department of Justice;

Periods of delivery; provisions for

(4) When so directed by order of the Secretary of Agriculture, provide for a period, after trading in contracts of sale of any commodity for future delivery in a delivery month has ceased, during which contracts of sale of such commodity for future delivery in such month may be satisfied by the delivery of the actual cash commodity. Whenever, after due notice and opportunity for hearing, the Secretary of Agriculture finds that provision for such a period of delivery for any one or more commodities or markets would prevent or tend to prevent "squeezes" and market congestion endangering price stability, he shall, by order, require such period of delivery (which shall be not less than three nor more than ten business days) applicable to such commodities and markets as he finds will prevent or tend to prevent such "squeezes" and market congestion: *Provided, however,* That such order shall not apply to then existing contracts;

Notice of date of intended delivery

(5) Require the party making delivery of any commodity on any contract of sale of such commodity for future delivery to furnish the party obligated under the contract to accept delivery, written notice of the date of delivery at least one business day prior to such date of delivery. Whenever, after due notice and opportunity for hearing, the Secretary of Agriculture finds that the giving of longer notice of delivery is necessary to prevent or diminish unfair practices in trading in any one or more commodities or markets, he shall by order require such longer notice of delivery (which shall be not more than ten business days) applicable to such commodities and markets as he finds will prevent or diminish such unfair practices: *Provided, however,* That such order shall not apply to then existing contracts;

United States standards; conformity of grades to

(6) Require that all contracts of sale of any commodity for future delivery on such contract market shall provide for the delivery thereunder of commodities of grades conforming to United States standards, if such standards have been officially promulgated;

Warehouse receipts as satisfaction of futures contract

(7) Require that receipts issued under the United States Warehouse Act shall be accepted in satisfaction of any futures contract, made on or subject to the rules of such contract market, without discrimination and notwithstanding that the warehouseman issuing such receipts is not also licensed as a warehouseman under the laws of any State or enjoys other or different privileges than under State law: *Provided, however,* That such receipts shall be for the kind, quality, and quantity of commodity specified in such contract and that the warehouse in which the commodity is stored meets such reasonable requirements as may be imposed by such contract market on other warehouses as to location, accessibility, and suitability for warehousing and delivery purposes;

Enforcement of bylaws, etc., relating to trading requirements

(8) enforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof or any committee, which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other trading requirements, and which have not been disapproved by the Secretary of Agriculture pursuant to paragraph (7) of section 12a of this title; and revoke and not enforce any such bylaw, rule, regulation, or resolution, made, issued, or proposed by it or by the governing board thereof or any committee, which has been so disapproved; and

Enforcement of bylaws, etc., providing minimum financial standards and related reporting requirements

(9) enforce all bylaws, rules, regulations, and resolutions made or issued by it or by the governing board thereof or by any committee, which provide minimum financial standards and related reporting requirements for futures commission merchants who are members of such contract market, and which have been approved by the Secretary of Agriculture. As amended Feb. 19, 1968, Pub.L. 90—258, § 12, 82 Stat. 29.

§ 8. Application for designation as "contract market"; suspension or revocation of designation; hearing; review by court of appeals

Any board of trade desiring to be designated a "contract market" shall make application to the Secretary of Agriculture for such designation and accompany the same with a showing that it complies with the conditions of section 7 of this title, and with a sufficient assurance that it will continue to comply with the requirements of such section 7. In the event of a refusal to designate as a "contract market" any board of trade that has made application therefor, such board of trade shall be afforded an opportunity for a hearing before the commission, with the right to appeal an

adverse decision after such hearing to the court of appeals as provided for in other cases in paragraph (a) of this section.

(a) The commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a "contract market" upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder. • • •

§ 13a. Nonenforcement of rules of government or other violations, cease and desist orders against contract markets; punishment; misdemeanor; separate offenses

If any contract market is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 7 of this title, or if any contract market, or any director, officer, agent, or employee of any contract market otherwise is violating or has violated any of the provisions of this chapter or any of the rules, regulations, or orders of the Secretary of Agriculture or the commission thereunder, the commission may, upon notice and hearing and subject to appeal as in other cases provided for in paragraph (a) of section 8 of this title, make and enter an order directing that such contract market, director, officer, agent, or employee shall cease and desist from such violation, and if such contract market, director, officer, agent, or employee thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such contract market, director, officer, agent, or employee shall be guilty of a misdeameanor and, upon conviction thereof, shall be fined not less than $500 nor more than $10,000 or imprisoned

for not less than six months nor more than one year, or both. Each day during which such failure or refusal to obey such order continues shall be deemed a separate offense. As amended Feb. 19, 1968, Pub.L. 90—258, § 18, 82 Stat. 31.

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§ 13c. Responsibility as principal; minor violations

(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations, or orders issued pursuant to this chapter, or who acts in combination or concert with any other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible in administrative proceedings under this chapter for such violation as a principal.

(b) Nothing in this chapter shall be construed as requiring the Secretary of Agriculture or the commission to report minor violations of this chapter for prosecution, whenever it appears that the public interest does not require such action.

Sept. 21, 1922, c. 369, § 13, as added Feb. 19, 1968, Pub.L. 90—258, § 26, 82 Stat. 34.

Title 17 C.F.R.

Part 0—Rules of Practice Under the Commodity Exchange Act

Subpart A—Rules Applicable to Proceedings Before the Secretary of Agriculture

Sec. 0.0 Scope and applicability of rules of practice. Sections 0.1-0.22, inclusive, of this subpart shall apply to the conduct of all disciplinary proceedings as hereinafter defined in paragraph (j) of sec. 0.2.

Sections 0.1, 0.2, and 0.23-0.27, inclusive, of this subpart shall apply to the conduct of all rulemaking proceedings as hereinafter defined in paragraph (k) of sec. 0.2.

Sec. 0.1 Meaning of words. Words in this subpart in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

Sec. 0.2. Definitions. As used in this subpart, the terms as defined in section 2 of the Act shall apply with equal force and effect. In addition, and except as may be provided otherwise herein:

(a) The term "Act" means the Commodity Exchange Act, approved September 21, 1922 (42 Stat. 998); as amended June 15, 1936 (49 Stat. 1491; 7 U.S.C. 1-17a), and other legislation supplementary thereto and amendatory thereof;

Rules Applicable to Disciplinary Proceedings

Sec. 0.3 Institution of proceedings—(a) *Application to institute proceedings.* Any interested person having any information of any violation of the Act, or of any of the regulations promulgated thereunder, by any person (other than a contract market) may file with the Act Administrator an application requesting the institution of such proceeding as is authorized under the Act. Such application shall be in writing, signed by or on behalf of the applicant, and shall include a short and simple statement of the facts constituting the alleged violation and the name and address of the applicant and the name and address of the person against whom the applicant complains.

(b) *Status of applicant.* The person filing an application as described in paragraph (a) of this section shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant may be permitted to intervene therein, in the manner hereinafter provided, or may be called as a witness, and the applicant's identity shall not be divulged by any employee of the Department, except with the applicant's prior consent or upon court order.

(c) *Who may institute.* If, after investigation of the matters complained of in the application described in paragraph (a) of this section, or after investigation made on his own motion, the Secretary "has reason to believe that any person (other than a contract market) is violating or has violated any of the provisions of the Act, or any of the rules and regulations made pursuant to its requirements, or has manipulated or is attempting to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any board of trade,"[1] he will institute a proceeding: *Provided,* That in any case, except one of willfulness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of a registration or license, facts or conditions which may warrant such action shall be called, in writing, to the attention of the person complained against, and such person shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints issued by the Secretary and will not be instituted upon pleadings filed by private persons.

Subpart B—Rules Applicable to Proceedings Before the Commodity Exchange Commission

Sec. 0.50 Scope and applicability of rules of practice. Sections 0.51-0.72, inclusive, of this subpart shall apply to the conduct of all disciplinary proceedings as hereinafter defined in sec. 0.52. Sections 0.51, 0.52, and 0.73-0.77, inclusive, shall apply to the conduct of all rulemaking proceedings as hereinafter defined in sec. 0.52. Sections 0.51, 0.52 and 0.78-0.95, inclusive, shall apply to the conduct of all 6a proceedings as hereinafter defined in sec. 0.52.

Sec. 0.51 Meaning of words. Words in this subpart in the singular form shall be deemed to import the plural, and vice versa, as the case may demand.

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[1] Words in quotation marks in sec. 0.3(c) are from sec. 6(b) of the Commodity Exchange Act (7 U.S.C. 9).

Sec. 0.52 Definitions. As used in this subpart, the terms as defined in section 2 of the Act shall apply with equal force and effect. In addition, and except as may be provided otherwise in this subpart:

(a) The term "Act" means the Commodity Exchange Act, approved September 21, 1922 (42 Stat. 998), as amended June 15, 1936 (49 Stat. 1491; 7 U.S.C. 1-17a), and other legislation supplementary thereto and amendatory thereof;

Rules Applicable to Disciplinary Proceedings

Sec. 0.53 *Institution of Proceedings*—(a) *Application to institute proceedings.* Any interested person having any information of any violation of the Act, or of any of orders or regulations promulgated thereunder, by any board of trade or by any director, officer, agent, or employee thereof may file with the Act Administrator an application requesting the institution of such proceeding as is authorized under the Act. Such application shall be in writing, signed by or on behalf of the apllicant, and shall include a short and simple statement of the facts constituting the alleged violation and the name and address of the applicant and the name and address of the person against whom the applicant complains.

(b) *Status of applicant.* The person filing an application as described in paragraph (a) of this section shall have no legal status in the proceeding which may be instituted as a result of the application, except where the applicant may be permitted to intervene therein, in the manner hereinafter provided, or may be called as a witness, and applicant's identity shall not be divulged by any employee of the Department, except with the applicant's prior consent or upon court order.

(c) *Who may institute.* If, after investigation of the matters complained of in the application described in paragraph (a) of this section, or after investigation made on its own motion, the Commission has reason to believe that

any board of trade or any director, officer, agent, or employee thereof has violated or is violating any of the provisions of the Act, or of any of the regulations promulgated thereunder, the Commission will institute an appropriate proceeding: *Provided,* That in any case, except one of willfulness or one in which the public health, interest or safety otherwise requires, prior to the institution of a proceeding for the suspension or revocation of any designation of a contract market, facts or conditions which may warrant such action shall be called to the attention of the market in writing and such market shall be accorded opportunity to demonstrate or achieve compliance with all lawful requirements. Proceedings will be instituted only upon complaints issued by the Commission and will not be instituted upon pleadings filed by private persons.